

OFFICE OF THE APPELLATE DEFENDER

REPORT TO THE MONTANA PUBLIC DEFENDER COMMISSION

November 1 through December 1, 2009

UPDATES:

Pay Plan: The appellate attorneys submitted a proposed pay plan before I became Chief. After review of their plan, I submitted an alternative plan to Randi Hood, Harry Freebourn, and Barb Kain. They have reviewed both plans and are currently developing a counterproposal, so the appellate attorneys, who do not currently have a pay plan/career ladder, can have such a ladder and possibly receive pay increases like the trial attorneys already have. Pay increases then trigger a funding issue, and such funding should become part of the decision package for ADO during the 2011 legislative session.

Policy Manual: I developed an appellate attorney policy manual covering topics from *Anders* briefs to client contact, to name a couple. This manual is in draft form. The draft has been distributed to the appellate attorneys for their comments and involvement. Upon refining the draft, I will then submit the manual to Barb Kain for her input from a human resource officer perspective. After that occurs, the ADO will have a manual in place for use by current and future appellate attorneys. It is noteworthy that most of the policies are currently in place and this process serves to memorialize those policies in one manual. This policy manual should also memorialize the management plan for ADO, including what I believe to be the most important management technique--that of communication.

Caseloads: Through discussion with and assistance from the appellate attorneys, the ADO has developed a system to assess caseloads. This system is more informal than the weighting system in place for the trial attorneys. However, the ADO consists of seven attorneys. We thought it best to keep the system simple at first and, upon testing the system for a couple of months, if the system needs to be altered, we will do so at that time.

The "system" entails discussion between the appellate attorney I am assigning the case to and me. I review the transcripts and the possible appellate issues to the extent I can with the information I receive from the trial attorney. I assess how long I believe the case will take the appellate attorney to research and brief the issues. I then sit down with the appellate attorney and give that attorney my assessment of the case. I ask the appellate attorney to make his/her own assessment given that attorney's current workload. If that attorney advises me that he/she will not realistically be able to brief the case for another six

months, I will contract out the case. With this system I will be able to gauge the appellate attorneys' workloads as well as monitor cases I determine will only take two weeks versus those that will take two months.

JustWare: ADO has again begun the process of inputting time into JustWare. Through assistance from Koan Mercer, we have developed four specific case descriptions to track appellate time. Those descriptors track the time an appellate attorney spends on (1) consulting with the trial attorneys; (2) consulting with other appellate attorneys; (3) training, such as preparation for CLEs; and (4) administration. I also have a descriptor for time spent on solely management functions. With these descriptors, ADO will be better equipped to discern where percentages of time are spent. This information will assist in reporting to the Commission and the Legislature regarding the needs of ADO. For example, if an appellate attorney spends 20 percent of his/her time consulting with the trial attorneys, that information may indicate the need for research attorneys at each region, which does not now currently exist. In addition, by tracking my management time, I will be better equipped to report to the Commission the extent to which I can also handle a caseload.

Standards: The standards for appellate attorneys need to be revised. They are quite general and those targeting postconviction relief must be amended to reflect the statutory process.

CASES:

The spreadsheet showing the case count for the appellate office for fiscal year 2010 is attached as Exhibit 1. The case counts for prior fiscal years are being developed. They require printing and hand-counting of several reports. A single report is being written to streamline this process. Noteworthy is the fact that our base is growing each month, which explains the backlog that the ADO has. That backlog slowly lessens each month but only when our base grows slightly.

NOTEWORTHY ISSUES and POTENTIAL FINANCIAL IMPACTS:

Conflict Synopsis: The full conflict memorandum/brief is attached as Exhibit 2. In short, there is not a clear answer on the conflict issue. Some jurisdictions apply a per se bar. Other jurisdictions look at the issue on a case-by-case basis.

In analyzing the issue, the ADO should seek the State's opinion on this issue, as well as the State Bar of Montana's. I propose a brief be submitted with a motion that Koan Mercer will file on behalf of his client. Mr. Mercer's client is alleging that ADO must withdraw because a conflict exists since ADO is part of OPD. The issue regarding conflicts at the regional level will be

addressed in *State v. St. Dennis*, DA 09-0284, an appeal that an appellate contract attorney is handling. The ACLU has been granted authority to appear as amicus in *St. Dennis*, wherein the ACLU “anticipates that this appeal will involve issues concerning the constitutionality of the statewide public defender system, a question of great interest and concern to ACLU-MT.” (Order, DA 09-0284, attached as Exhibit 3.)

We cannot know for sure how this issue will be decided. We have instructive opinions from sister states who have split on the approach to the conflict issues. We also have an instructive, non-binding, ethical opinion from the State Bar of Montana. As we all know, Montana is a large state with a small legal bar and an even smaller criminal bar. States with our similar budgetary and judicial constraints handle conflict issues in much the same manner as we currently handle them. However, resolution from the Montana Supreme Court is ultimately required for this issue.

State v. Gatlin, 2009 MT 348. The decision is attached as Exhibit 4.

Until this case was handed down, the practice as far as can be discerned state-wide was to bring defendants who appeared on an out-of-county warrant before a JP merely to advise them of the warrant’s contents and to have bond set in the amount listed on the warrant. The JPs in the non-charging county did not treat this appearance as a formal “initial appearance” on the out-of-county charges and did not appoint counsel on the other county’s charges.

Gatlin disallows this practice, holding the practice of going before a judge on an out-of-county warrant amounts to an “initial appearance” for the purposes of Mont. Code Ann. §§ 46-7-102 and -8-101. This means that defendants now appearing on out-of-county warrants must be advised of their right to counsel. And, upon request, must be appointed OPD counsel for the out-of-county charges by the judge in the non-charging county.